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PENDAKWA RAYA

v.

KEK LEONG PENG

HIGH COURT MALAYA, JOHOR BAHRU

LC VOHRAH J

b

[CRIMINAL APPEAL NO. 58-14-88]

1 JANUARY 1992

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Observation kept on accused - Accused attempted to run away - Threw away a package - Contains granular substance - Analysed and found to be heroin - No break in the chain of evidence.*

c

On 3 February 1988 as a result of information received, Inspector Nordin assembled four officers and gave them a briefing about a surveillance they were to undertake in two groups at Taman Sentosa. On arrival they kept observation on a male Chinese standing at a coffee shop across the road about 50 meters from where they had taken up their respective positions. The officers kept surveillance for about half an hour. After that one of them crossed the road and identified himself as a police officer to the accused who immediately turned around and attempted to run away. He was however clasped from behind and during the struggle that ensued the accused took out a package from his waist and threw it away. The package was picked up and was later sent to the chemist for analysis. It was found to contain 45 grams of heroin.

*d**e*

The package was handed over to the investigating officer who marked and sealed it before sending it to the chemist. There was no break in the chain of evidence.

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The accused was called upon to enter upon his defence. He said the drugs was thrown away by one Mua Po Meng who was standing with him at the shop. A remand prisoner also gave evidence on behalf of the accused. According to him he was at the scene on the day in question and happened to witness the events that took place for about 10 minutes. He saw a male Chinese running away at that time but he was not being pursued by anybody.

The defence was therefore a denial on the part of the accused that he was ever in possession of the incriminating exhibits.

Held:*g*

[1] It is unlikely that after knowing Mua Po Meng for 4 or 5 months before the date of his arrest that the accused should have had no knowledge of his real name, address and occupation, particulars which would ordinarily have been known to a person having a social relationship with another. The accused in cross-examination said that he had told one of the officers at the scene that it was Mua Po Meng who had thrown the incriminating package but this fact was never put to the said officer in cross-examination by the Counsel for the accused.

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[2] It is strange that the remand prisoner who gave evidence on behalf of the accused should decide to give evidence only at the very last moment during the course of the trial when he already knew that the trial had begun on 21 December 1991 after having heard of it from a cell-mate.

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[3] The improbabilities in the evidence of the accused and the remand prisoner are far too many for them to be credible. On the other hand there is no motive on the part of the police officers to falsely implicate the accused on the charge preferred against him and there is no reason whatsoever to doubt the veracity of these two officers after seeing them give evidence on the stand.

[Accused found guilty and convicted.]

Case referred to:

Su Ah Ping v. PP [1980] 1 MLJ 75 (dist)

Legislation referred to:

Dangerous Drugs Act 1952, s. 37(da)(i)

Evidence Act 1950, s. 114(e)

For the public prosecutor - Hadhariah bte Syed Ismail, Deputy Public Prosecutor

For the accused - Leong Wey Pyu; M/s. W.P. Leong & Partners

JUDGMENT

LC Vohrah J:

The accused was charged with:

Bahawa kamu pada 3 Februari 1988 jam lebih kurang 1.15 tengahari di satu lorong di Jalan Sutera 3, Taman Sentosa, Johor Bahru, di dalam daerah Johor Bahru, di dalam Negeri Johor, telah mengedar dadah berbahaya iaitu heroin dengan jumlah berat 45 grams bagi pihak diri kamu sendiri dan dengan itu kamu telah melakukan satu kesalahan di bawah s.39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s.39B(2) Akta yang sama.

As adduced by the prosecution the facts of this case were quite straightforward. On 3 February 1988 as a result of information received at about 11.30 a.m., Inspector Nordin bin Kadir (PW4) assembled his officers, Detective Constable Sharif bin Haji Jamaluddin, Detective Constable Muda bin Mohamed, Detective Constable Wahid bin Ibrahim (PW5) and Detective Constable Borhan bin Wahab, and gave them a briefing about a surveillance they were to undertake in two groups at Taman Sentosa. On arrival there PW4 took up a position at Southern Inn Hotel together with PW5 and Borhan whilst the others, forming the second group, stationed themselves at the Bata shop nearby, both on the same side of Sentosa Complex. They kept observation on a male Chinese who was wearing a long-sleeved white shirt and black pants standing at a coffee shop Mido Baru which was across the road about 50 meters from where they had taken up their respective positions. During this surveillance for about half an hour the accused was seen walking up and down in front of the shop. He was then seen crossing the road and walking in their direction and subsequently into a lane off Jalan Sutera Tiga opposite the car park exit of Sentosa Complex. He was followed a short distance behind by PW4, PW5 and Borhan. The accused then stood in the lane facing Sentosa Complex. Pursuant to instructions given to him by PW4, PW5 crossed the road and identified himself as a police officer to the accused who immediately turned around and attempted to run away. PW5 however managed to clasp him from behind and during the struggle that ensued the accused took out a package (P4A) from his waist and threw it away. At that point of time, PW4 came up with Borhan and rendered assistance by handcuffing the accused. On instructions given by PW4, Borhan picked up P4A which was lying on the ground in the lane and handed it over to PW4. On opening P4A, PW4 found a white transparent plastic packet (P4 A1) secured by a red plastic string (P4 A3) containing granular

- a* substances (P4 A2) which he suspected to be drugs. The accused was then taken back to the police station with the exhibits. A representative sample of P4 A2 was later analysed by the government chemist (PW2) and P4 A2 was found to contain 45 grams of heroin.
- In the light of the submissions that were made by Counsel for the accused at the end of the prosecution case, it would be convenient at this stage to consider in some detail the evidence relating to the handling of the incriminating exhibits.
- b* PW4, who was a principal witness in this case, stated that during the observation of the accused from the time he saw the accused at Mido Baru up to the moment when the accused was handcuffed in the lane he did not lose sight of the accused. The accused was alone and he saw the accused retrieving P4A from his waist and throwing it on to the ground whereupon he requested Borhan to pick it up. When he took possession of it at the scene
- c* he unloosened the knot on top in the presence of PW5, Borhan and the accused and found inside it P4 A1, which was transparent and secured by the red string P4 A3, containing granular substances which he suspected to be drugs. He did not untie P4 A3 as the contents of P4 A1 were visible. He then put P4 A1 back into P4A and knotted it up again in the manner in which he had originally found it and, when he returned to his office at the police station with it, he locked it up in an empty drawer. It was at 4.20 p.m. on the same day that
- d* he surrendered it to Chief Inspector Ahmad Sofi bin Haji Zakaria (PW3) and at the time of surrender he marked both P4A and P4 A1 for identification by inscribing his signature and the date. (These markings appeared on these two exhibits.) He could not remember at the time of surrender whether P4A had any hole or tear in it as he had not examined it closely. Nor could he remember whether there were any knots in the red string P4 A3. He did prepare a search list (P7) but could not remember if he gave the accused a copy.
- e* PW5 gave evidence which corroborated PW4's evidence that the accused threw P4A whilst in the lane and that it fell at the point 'X' in photograph P1D. He also saw Borhan pick it up and hand it over to PW4 who did not untie P4 A1 but did show it to him before putting it back into P4A. PW4 subsequently took it with him to the police station. The accused was alone at the scene when he was arrested. He was present when PW4 wrote out his signature and the date on P4A and P4A1 when he surrendered the exhibits to PW3.
- f* The evidence of PW3 also corroborated PW4's evidence in that when P4A and P4 A1 were surrendered to him for safe custody on the afternoon of 3 February 1988, PW4 wrote out his signature and the date on the two exhibits. He too did not open P4 A1 before he locked it away in the empty drawer of his steel cabinet. He had occasion to take out the exhibits at 10.30 p.m. that night for the photograph P1D to be taken by PW1. It was after the photograph
- g* had been taken that he put his own markings 'A' and 'A1' on P4A and P4 A1 respectively. (These markings too appeared on the exhibits). Then he locked them away once again in his steel cabinet. On 7 February 1988 at about 11.30 a.m. he took out the exhibits and placed them in an envelope (P4) which he marked 'S' and sealed it with the police seal. He also inscribed on it the words "I.O. Insp. Sofi" and the police report reference "JBR 2116/88" before handing it over to the chemist PW2 on the same day.
- h* PW2's testimony was that when he received the envelope P4 bearing the markings 'S', "JBR 2116/88" and "I.O. Insp. Sofi" from PW3 it was sealed with the police seal and the seals were intact. When he weighed the granular contents of P4 A1 he found the weight to be 245 grams. After thoroughly homogenizing these granular substances he took out a representative sample weighing 12.9504 grams for analysis. All this took place on the very day he received the sealed envelope from PW3. After taking the representative sample he
- i* retied P4 A1 with the same string P4 A3 and put it back into P4A which was then put into

the original envelope P4 which envelope he then resealed with his departmental seal. He returned the sealed envelope (minus the representative sample) to PW3 the next day because departmental policy based on security reasons forbade the keeping of drug exhibits for any length of time. The representative sample was taken after “thorough homogenization” and after 4 processes of coning and quartering. When he untied P4 A1 he noticed only one knot in the string P4 A3 but he personally could have been responsible for the 3 knots presently in the string when he retied P4 A1. His evidence was technical and, in my view, uncontroversial.

It was on the basis of the above evidence that the prosecution sought to establish the identity of the incriminating exhibits and the continuity in the chain of evidence.

Counsel for the accused submitted at the close of the prosecution evidence that a case had not been made out against the accused on the ground that proof of the incriminating exhibits was somewhat wanting. His arguments can be summarised as follows:

- (1) that no evidence had been led to show that the representative sample of the drugs P4 A2 taken by PW2 for his analysis had not been tampered with during the period it was in the custody of PW2 for the purpose of his analysis;
- (2) that the existence of the tear in the red plastic bag P4A and of the 3 knots in the plastic string P4 A3 would indicate that the white plastic packet P4 A1 and its contents P4 A2 might have been tampered with;
- (3) that the failure to call Detective Constable Borhan bin Wahab who had picked up P4A to identify it after the identity of the drug exhibits had been questioned was fatal to the prosecution case on the authority of *Su Ah Ping v. PP* [1980] 1 MLJ 75;
- (4) that the sergeant in charge of the exhibits store should have been called to show what happened to the exhibits when they were surrendered to his custody; and
- (5) that there was a material contradiction in the prosecution evidence between the oral evidence presented and the documentary evidence tendered in the form of P7 wherein it was written by PW4 that P4A with its contents was found “di atas jalan raya” when the oral evidence showed that it was actually recovered from the lane where the accused was arrested.

I found no merit in any of the above arguments. As to argument No.1, it was my view that the provisions of s. 114(e) of the Evidence Act, 1950 clearly applied in the circumstances as PW2 who carried out the analysis must be presumed to have taken the necessary precautions to ensure that the representative sample he removed from P4 A2 was not tampered with in order to be able to carry out a correct analysis in the regular performance of his official act. As regards argument No. 2, I did not think that the small tear at the bottom of P4A of itself indicated that its contents in the form of the white plastic bag P4 A1 and the drugs P4 A2 therein contained were or could have been interfered with before they were sent to the Chemistry Department for analysis. The evidence of PW3 clearly indicated that when he received P4A with its contents at 4.20 p.m. on 3 February 1988 he kept it in his steel cabinet and locked it after P4A and P4 A1 had been marked for identification by PW4 by means of PW4’s signature and that day’s date and again after the inscription of his own markings ‘A’ and ‘A1’ later that night when the photograph P1E was taken by PW1. Then on 7 February 1988 he sealed P4A and its contents in an envelope and surrendered it to PW2 for analysis so that when the representative sample was taken by PW2 for his examination it was removed from P4 A1 whose contents P4 A2 could not have been tampered with as P4A had all along been under lock and key in the custody of PW3. There was no reason for me to disbelieve PW3’s evidence on this score. As to argument No. 3, it was my view that there was no

a obligation on the part of the prosecution to call Borhan who had picked P4A up from the lane to give evidence as to its identity because P4A together with its contents had been identified unmistakably by PW4 and PW5 who were at the scene and had witnessed its recovery. Suffian LP (delivering the judgment of the then Federal Court) had this to say in *Su Ah Ping* (at p. 76):

b The complaint before us was not that there had been no proof that the exhibits were serviceable, but simply that there was a “break in the chain of evidence”, and the prosecution should have called as witnesses all the officers through whose hands the exhibits passed from Inspector Takbir to the armourer and back to the Inspector. We do not think there is merit in this point. The question was whether the exhibits the Inspector produced were the guns and ammunition he found at the scene, and as when he produced them as those very guns and ammunition there was no objection by the defence, it would have been a waste of judicial time to call all the intervening handlers. In our experience much judicial time is spent unnecessarily, notably in subordinate Courts, in ensuring no break in the chain of evidence.

c In our judgment, if the officer who picked up an object at the scene produced it and identified it as that very object, that is enough, and there is no need to call every other officer who handled it.

d *Su Ah Ping* is not authority for the proposition that the retrieving officer as such must be called in every case to identify the exhibit recovered even when it had already been positively identified by other witnesses. From the evidence of PW4 and PW5 at the close of the prosecution case, I was satisfied that P4A with its contents was picked up at the scene. Further I did not think it could be suggested that the presumption adverse to the prosecution must be drawn under s. 114(g) of the Evidence Act 1950 as Borhan was made available to the defence by the prosecution and the defence did not call him. As to argument No. 4, in the light of the observations made above with regard to argument No. 2 and the confirmation by Counsel for the accused during the trial when the envelope P4 containing the incriminating exhibits was about to be opened that the seals on the envelope were intact, it was obvious that they could not have been interfered with whilst the sealed envelope was in the exhibits store. In any event, what was important, in my view, was the nature of the representative sample that was taken on 7 February 1988 by PW2 from the contents of the sealed envelope

e handed to him by PW3 on that day. Up to the time he took the representative sample from the contents in P4 A1 I had no reason whatsoever to think, as I have adverted to above, that the contents had in any way been interfered with since the time of recovery by the police at the scene. As regards argument No. 5, no application was made by Counsel for the accused to cross-examine the maker PW4 as to the contents of the search list P7 when it was produced in re-examination in order to substantiate PW4’s answer to the question put by Counsel in cross-examination as to whether or not he had prepared a search list. In my view, Counsel should have applied to question PW4 as to the meaning of “di atas jalan raya” if he had intended to make an issue out of that description. I did not think that this misdescription, if any, of the recovery site affected the reliability to be placed on PW4’s or PW5’s oral evidence relating to P4A’s recovery from the lorong at the point marked ‘X’ in photographs P1C and P1D. In my view, as the lane was used by vehicles as shown by the presence of three cars and a van in photograph P1C, it could quite naturally have been described as “jalan raya”.

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In the result, in the light of the prosecution evidence that the accused was seen throwing the incriminating package containing more than 15 grammes of heroin from his person just before his arrest, I was satisfied that a case had been made out against him on the charge, having regard to the presumption contained in s. 37(da)(i) of the Dangerous Drugs Act 1952.

i I accordingly called upon the accused to enter upon his defence.

The accused elected to give his evidence on oath as follows:

At the time of his arrest he was just under 21 years of age and was engaged in the business of selling cuttle-fish. He was then staying in a rented room at a house in Jalan Sutera Tiga. On waking up about noon on the day in question he proceeded to the coffee shop Mido Baru in Jalan Sutera to have his brunch consisting of eggs and coffee. Whilst he was placing his order a friend of four to five months' standing known to him as Mua Po Meng walked in. They then proceeded to eat together and Mua invited him to go bowling. At some point Mua indicated that he wanted to make a telephone call and left the shop. When Mua returned they left Mido Baru together and proceeded to a shop selling car exhaust-pipes in Jalan Sutera Tiga on the opposite side of the road where a friend of his named Ah Seong worked as he wanted to borrow RM100 from him for his bowling expenses. After meeting Ah Seong in the shop and failing to obtain the loan he came out of the shop and waited outside whilst Mua Po Meng went to a coffee shop nearby. When Mua Po Meng returned Mua Po Meng told him that they were going to be picked up for the bowling excursion by a Singaporean friend of his in the lane next to the block of shops where they were. They then walked together into the lane, and whilst inside the lane, on hearing a noise they looked back to see and discovered three Malay men in civilian clothes behind them in the act of rushing at Mua Po Meng who immediately took flight. Before Mua Po Meng fled he threw away a red packet similar to P4A. Three of the Malay men gave chase to Mua Po Meng and a fourth Malay, whom he recognised as PW5, arrested him. PW5 did so by applying a full nelson on him. PW4 then handcuffed him and PW5 picked up P4A from the ground. All this happened before he reached the point 'S' shown in photograph P1D in the lane where they were to be picked up. It was Mua Po Meng who was strolling up and down in front of Mido Baru after he had made his telephone call. It was only when he failed to get a loan from Ah Seong and indicated that he would not go bowling that Mua Po Meng offered to bear his expenses and informed him that his Singaporean friend was waiting for them in the lane. When he was arrested at the scene he did tell PW4 that Mua Po Meng was the one who had thrown P4A. He only gave the police a description of Mua Po Meng because he did not know his full name or address.

DW3, a remand prisoner aged 20 years, testified that he was arrested for the offence of self-administration under s. 15 of the Act on 3 December 1991 and that whilst in remand he came to know from a cell-mate that the present trial had started on 21 December. He was at the scene on the day in question and happened to witness the events that took place for about 10 minutes. It was then about 1.00 p.m. and he was on his way to buy cooked rice for his lunch from a coffee shop in Taman Sentosa. He saw many people at the bus-stand near the lane shown in photograph P1C and some people running towards Sentosa Complex. He also saw a male Chinese running at that time but he was not being pursued by anybody. This man was certainly not the accused. He did however see the accused "being grabbed by others from behind" at the entrance to the lane. Although the present trial had begun on 21 December he decided to give evidence only during the course of the trial and was served with a *subpoena* on 28 December to do so. He had promised the accused to testify on his behalf after meeting him in the prison because he knew that the accused was innocent as he had seen some other person running, throwing away a packet, and then escaping. Because he was a drug addict he was too scared to have gone to the police to report what he had seen.

The only other witness called for the defence was ASP Goh Boon Keng (DW2) whose evidence related to an investigation he conducted with regard to the loss of drug exhibits in one of the exhibits stores in Balai Polis Sentral, Johor Bahru, relating to three cases

a unconnected with the accused's case. His evidence, it was conceded by Counsel for the accused, was superfluous in the light of the evidence that when P4 was tendered in Court the Department of Chemistry seal on it were intact as confirmed by Counsel.

b The defence therefore was a denial on the part of the accused that he was ever in possession of the incriminating exhibits and amounted to an assertion that the arresting officers PW4 and PW5 were not telling the truth about the events on the day in question. The result of the case therefore depended upon assessing the credibility of the accused and his supportive witness DW3 on the one hand and that of PW4 and PW5 on the other in the light of the totality of the evidence. I found it unlikely that after knowing Mua Po Meng for 4 to 5 months before the date of his arrest that the accused should have had no knowledge of his real name, address and occupation, particulars which would ordinarily have been known to a person having a social relationship with another. I also found it strange that he should have waited nearly four years to disclose the existence of this person at the trial when, having regard to the fact that his own life was at stake, anybody in his predicament would have laid a complaint against the arresting officers for wrongful arrest. I noted that he did say in cross-examination that he had told PW4 at the scene that it was Mua Po Meng who had thrown the incriminating red packet away but this fact was never put to PW4 in cross-examination by Counsel for the accused. I also found it a little odd that he should have gone to wait for the Singaporean friend of Mua Po Meng in a narrow lane in order to be picked up for a game of bowling when it would have been most convenient for the two of them to have waited on Jalan Sutera Tiga itself which was clearly a main thoroughfare. I also found it incredible that if there was such an arrangement any information of this should have been conveyed to him only at the last moment after he had failed to obtain the loan from Ah Seong. With regard to DW3, he had to be warned at the start of his cross-examination to respond directly to the Deputy Public Prosecutor and not to take time to ponder over her questions before answering. I found it strange that being so concerned with the innocence of the accused he should decide to give evidence in this case only at the very last moment during the course of the trial when he already knew that the trial had begun on 21 December 1991 after having heard of it from a cell-mate. I also found it unlikely that he should walk 20 minutes from Taman Seri Tebrau, where he stayed and where his work place was, all the way to Taman Seri Sentosa to buy rice when it is common knowledge that there are many eateries in Taman Seri Tebrau itself. Further I found it improbable that he, having watched the events for about 10 minutes, did not see three Malays chasing the person who was running away, as the accused had stated, if that event actually occurred. In the result, I found these improbabilities in the evidence of the accused and of DW3 far too many for them to be credible. I could not help thinking the evidence of DW3 to be the concocted evidence of an instant witness. On the other hand, having regard to the admission of the accused himself that the police officers who gave evidence against him were strangers to him, I could find no motive on the part of PW4 and PW5 to falsely implicate the accused on the charge preferred against him. I also had no reason whatsoever to doubt the veracity of these two officers after seeing them give their evidence on the stand.

h In the final analysis, I found that the accused had not rebutted the presumption under s. 37(da)(i) on a balance of probabilities and I accordingly found him guilty on the charge and convicted him.

Also found at [1992] 1 CLJ 696

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